

Discussion Paper
ECOS Compliance Assurance Working Group
Team 1: Cooperative Federalism 2.0 - Principles in Action

At the September 10, 2017, ECOS Compliance Assurance Working Group meeting, the group made reference to the document *Cooperative Federalism 2.0* (CF 2.0) and there was a general assumption among many that “we all agree on the principles.” However, after further conversation, it was not clear that everyone understood the “principles” in the same way and therefore, agreement was not assured. The discussion took many different directions; however, at the end it appeared that there were more areas of agreement than disagreement. Team 1 was formed for the purposes of defining the “next level” of CF 2.0, i.e., to provide more description of the respective roles of the U.S. Environmental Protection Agency (EPA) and the states in executing the compliance aspects of federal environmental program.

The principles of cooperative federalism are embodied throughout the CF 2.0 document.
Examples include:

- Principle 2: States are the preferred implementing entities for national environmental regulatory programs for which federal statutes authorize their delegation. EPA should be the lead implementer in the case of a state that declines to assume this role, fails to appropriately implement such programs, or lacks the authority for a given program element.
- ~~Principle 3: States should have flexibility to determine the best way for their programs to achieve national minimum standards.~~
- Principle 5: States should be the primary enforcement authority for delegated programs. EPA should respect the states’ role as the primary implementer of national environmental regulatory programs. EPA should not review individual state implementation decisions, including enforcement, on a routine or recurring basis unless programmatic audits identify this need or particular circumstances compel federal action.
- Principle 6: EPA should periodically and routinely audit state implementation programs authorized or delegated, to achieve national minimum standards. These audits should be based on criteria mutually developed by states and EPA. When a state is not adequately achieving standards, EPA should be able to take appropriate action to ensure that a state will make consistent progress, including reassuming a lead implementation role.
- Principle 7: EPA has a role as a convener and facilitator in important pollutant-related interstate issues to efficiently support multi-state solutions.

The CF 2.0 amplifies themes from past ECOS resolutions, including 98-9, which encourages EPA to:

Commented [MC1]: Including these comments, especially at the outset, suggests that we are all in agreement on them. I do not agree with principle 3, for the reason noted below. I also think some important principles are missing from this list – most particularly, the need for national consistency and a level national economic playing field. I think we should try to start this paper by stating principles that we all agree on, rather than simply reciting principles previously adopted by ECOS.

Commented [MC2]: As currently drafted, I find this principle too broad and vague. It could be used to justify almost any action – or inaction – by a state, even if that action undercut other principles, e.g. the level playing field.

- Perform program oversight roles in a manner that does not extend into individual state regulatory actions, if such state actions will achieve compliance and are protective of public health and the environment;
- ~~Perform its oversight role consistent with policy and work-sharing agreements rather than performing direct federal inspections or enforcement actions when the appropriate response is to defer to the state program.~~

Further evidence that this discussion is not new or unique to current events, the *EPA Policy on Oversight of Delegated Environmental Programs* signed in 1984 by Administrator Ruckelshaus includes the following:

- EPA's oversight responsibility to ensure that federal environmental laws are enforced is best pursued in ways that effectively share responsibility with delegated states, that minimize the need for direct EPA action or intervention and that provide support for and participation by the states.
- In delegated programs, EPA's success depends in large part on the success of the state programs in effectively carrying out the work of pollution control and abatement.
- Delegated states have the lead responsibility for compliance and enforcement activities, and EPA expects delegated states to conduct strong compliance and enforcement programs.
- EPA evaluations should generally focus on overall program performance and identifying patterns of problems, rather than focusing on individual regulatory decisions by states.
- Individual actions will be reviewed selectively on an after-the-fact basis as part of an overall program audit or evaluation, in order to identify patterns of problems.

In light of these previous statements, the working group offered the concept of *subsidiarity* as an interpretive tool for implementing CF 2.0.

Subsidiarity is the organizing principle that matters should be handled by the least centralized authority with the capability to achieve resolution. Capability in the context of environmental enforcement includes evaluating whether the least centralized authority has sufficient enforcement resources, technical ability, technology, and the political will to foster compliance and correct noncompliance. The least centralized authority may lack capability when the matter is multi-jurisdictional. Subsidiarity advances the effective resolution of matters by bringing to bear the localized expertise of the decentralized authority within its areas of authority and capability. Subsidiarity also ensures that the central authority is more effective at those things that it alone can do, by not misdirecting its resources to tasks that can be fulfilled capably by the decentralized authority. It can then focus on the functions of delegating and auditing, implementing in the absence of capably-exercised authority by the decentralized authority, and providing leadership for issues that cross jurisdictions.

We propose that the working group adopt the principle of subsidiarity as expressed above. If the group adopts this statement, we recommend adopting the statements below as a further articulation of how subsidiarity would work in the contexts of inspections and enforcement.

Commented [MC3]: As drafted, I am concerned that this statement is too vague and unclear about who determines whether deference is "appropriate" in a given situation. The implication is that the state decides – which could be inconsistent with EPA's duty to act in a particular situation, e.g. lead in drinking water where the state thinks it is taking appropriate action but EPA disagrees.

Commented [MC4]: These statements from the Ruckelshaus memo are fine but incomplete and somewhat one-sided. As noted in cover memo, I suggest adding some additional important statements, to present a more balanced perspective of the Ruckelshaus policy and federal and state roles.

Commented [MC5]: As noted in cover memo, I do not disagree with the concept of subsidiarity, when combined with a realistic definition and understanding of state "capability." This principle works best in the situation where the state program is strong, capable and willing to take action. But it does not work well when that is not the situation presented, and that should be noted. Also, the proposals re inspections and enforcement that follow seem to assume a strong and capable state program, which is not universally the case.

Commented [MC6R5]:

Inspections

- The authority to conduct inspections is shared jointly by the states and EPA. Under the principle of subsidiarity, EPA should entrust decisions on how to exercise inspection authority to a state, including state initiatives, provided that the state maintains adequate authority and capability.
- Individual states will differ on the degree of co-implementation of inspections with EPA, some preferring greater EPA involvement, others less. EPA should recognize individual state preferences and work to integrate its own implementation efforts appropriately.
- EPA and the states should work together to assure adequate inspection coverage of regulated sectors. EPA may conduct independent inspections that supplement the state's work to provide adequate sector coverage or to address situations that present a threat to public health or the environment.
- Each state and region should discuss expectations with EPA regarding inspection decisions and identify those circumstances where the state may rely upon EPA assistance, including, but not limited to:
 - Situations where no state authority exists because a program or portion of a program has not been delegated or authorized;
 - Cross-state initiatives provided where adequate EPA-State coordination has occurred;
 - Situations in which the state lacks resources, technical expertise, or technology and requests EPA assistance;
 - Oversight inspections consistent with the audit function of the EPA.
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Enforcement

- Enforcement, including all potential activities to return entities to compliance, is an implementation function that should in general be exercised by the states where authority and capability exists.
- Each state and region should set clear expectations regarding enforcement policy, and identify those circumstances in which the state wishes to rely upon EPA, either for assistance, or to assume a lead role. The EPA will assume a lead enforcement role where state authority is lacking. EPA may, in coordination with the state, assume a lead enforcement role where state capability is lacking.
- The state is primarily responsible for establishing its enforcement response policies, including timing and manner of enforcement actions that will achieve the greatest environmental protection and compliance in the shortest possible time. State enforcement response policies must be consistent with any federal regulatory requirements.
- EPA and the states should work together to ensure that key aspects of enforcement response policies are reasonably consistent among the states, in order to assure a level national economic playing field.

Commented [MC7]: This is too narrow a statement of EPA's enforcement role and responsibility. Consider instead the following from the 1986 *Revised Policy Framework for State/EPA Enforcement Agreements*: "EPA will take action principally where a state is 'unwilling or unable' to take 'timely and appropriate' enforcement action. While many States view it as a failure of their program if EPA takes an enforcement action, that is not the approach or view adopted here. There are circumstances in which EPA may want to support the broad national interest in creating an effective deterrent to noncompliance beyond what a State may need to do to achieve compliance in an individual case or to support its own program."

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